

# **Exhibit A**

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September 24, 2018

*Via Electronic Mail*

Britt M. Miller, Esq.  
Mayer Brown  
71 South Wacker Drive  
Chicago, IL 60606

Re: *In re Dealer Management Systems Antitrust Litigation*, MDL No. 2817

Dear Britt:

Pursuant to ¶ 8(a) of the Confidentiality Order, *see* Dkt. 104, MDL Plaintiffs request that CDK de-designate the documents listed below and in Exhibit A (the “Subject Documents”) from “Highly Confidential” to “Confidential.” As explained below, none of the Subject Documents warrant “Highly Confidential” treatment under either the Confidentiality Order or relevant caselaw. Many of these documents have been the subject of our extensive prior correspondence on this topic, and you have declined to de-designate them.

The Subject Documents should be designated “Confidential” – not “Highly Confidential” – for at least six reasons:

*First*, none of the Subject Documents meet the specific definition for “Highly Confidential” provided in ¶ 2(g) of the Confidentiality Order. None of the Subject Documents contain (1) “copyrighted software”; (2) “computer or programming code and associated comments and revision histories”; (3) or “formulas, engineering specifications, or schematics that define or otherwise describe in detail the algorithms or structure of software or hardware designs.” *Id.*

*Second*, the Subject Documents are not of a “highly sensitive nature the disclosure of which could result in significant harm” to CDK. *Id.* Highly Confidential designations should “only be used on a relatively small and select number of documents where a genuine threat of competitive or other injury dictates such extreme measures.” *Global Material Techs., Inc. v. Dazheng Metal Fibre Co., Ltd.*, 133 F. Supp. 3d 1079, 1084 (N.D. Ill. 2015). “To justify [an

Attorneys' Eyes Only] designation, the designating party must do more than show that it is a competitor of the receiving party or that the documents in question disclose information about the designating party's relationships with other competitors." *Id.*; accord *Motorola, Inc. v. Lemko Corp.*, 2010 WL 2179170, at \*5 (N.D. Ill. June 1, 2010). The Subject Documents do not contain trade secrets, technological or proprietary information, current or recent customer lists, or financial details about CDK's business. Rather, the Subject Documents are comprised of collusive communications between CDK and its supposed competitor Reynolds, emails and documents about CDK's data access policies, and emails and documents about competition in the DMS and data integration markets – none of which support a "Highly Confidential" designation.

*Third*, as listed below, a number of the Subject Documents are communications between CDK and Reynolds. CDK-Reynolds communications categorically are not entitled to "Highly Confidential" treatment, because if they revealed information of such a "highly sensitive nature" that their disclosure could "result in significant harm" to CDK, CDK would not have shared them with its purported chief competitor.

*Fourth*, as listed below, virtually all of the Subject Documents are three or more years old. Many are even older. CDK cannot meet its burden to "establish good cause and explain with particularity why the information is not stale." *Global Material*, 133 F. Supp. 3d at 1085.

*Fifth*, under the Confidentiality Order, counsel can only disclose "Confidential" information to their clients (and employees of their clients) "to the extent Counsel determines in good faith that the employee's assistance is reasonably necessary to the conduct of this Action." Confidentiality Order ¶ 5(b)(2). And any such client or employee is barred from using Confidential information "for any purpose whatsoever other than in the above captioned case." *Id.* ¶ 5(a). In light of these restrictions, it is again CDK's burden to show that "disclosure of *these materials* to a small number of [Plaintiffs'] business personnel, all of whom will be subject to non-disclosure / non-use restrictions under the Court's protective order, presents a risk of disclosure (including inadvertently or accidentally) of sensitive competitive information." *Lemko*, 2010 WL 2179170, at \*4; accord *Global Material*, 133 F. Supp. 3d at 1084. There is no such risk here, because MDL Plaintiffs and our clients will fully comply with this Court's order and will not use the Subject Documents outside the context of this litigation – much less in a manner that will result in "significant harm" to CDK.

*Sixth*, "[o]n the other side of the ledger (assuming the Court even needs to get there, given defendants' failure to show a need for the extraordinarily restrictive limitations they seek to maintain), there is a legitimate need for [MDL Plaintiffs'] outside counsel to be able to consult with client representatives other than lawyers." *Lemko*, 2010 WL 2179170, at \*5; see also *Global Material*, 133 F. Supp. 3d at 1084 ("The [Highly Confidential] designation must be used selectively because discovery and trial preparation are made significantly more difficult and expensive when an attorney cannot make a complete disclosure of relevant facts to a client and because it leaves the litigant in a difficult position to assess whether the arguments put forward on its behalf are meritorious."). MDL Plaintiffs' clients (and their key executives) have a legitimate need to see the Subject Documents. Simply put, our clients' ability to evaluate the

Subject Documents is critical to their meaningful participation in this MDL – including their ability to determine their litigation strategy and provide knowledgeable input to counsel.

The above objections to CDK’s “Highly Confidential” designations for the Subject Documents apply on a document-by-document basis to every document listed below. MDL Plaintiffs further object to CDK’s designations as follows:

**I. Communications Between CDK and Reynolds (14 Documents)**

The following documents are not entitled to Highly Confidential treatment for the reasons stated above and because they are communications between competitors CDK and Reynolds; they are not “Highly Confidential” under ¶ 8(a) of the Confidentiality Order or the relevant caselaw; they are all more than three years old; and a “Confidential” designation will fully protect CDK’s legitimate interests:

- |                       |                        |
|-----------------------|------------------------|
| 1. <u>CDK-0222945</u> | 8. <u>CDK-0903802</u>  |
| 2. <u>CDK-1424529</u> | 9. <u>CDK-0919318</u>  |
| 3. <u>CDK-1974207</u> | 10. <u>CDK-1796970</u> |
| 4. <u>CDK-0048430</u> | 11. <u>CDK-2053730</u> |
| 5. <u>CDK-0774207</u> | 12. <u>CDK-2284462</u> |
| 6. <u>CDK-0222931</u> | 13. <u>CDK-1860966</u> |
| 7. <u>CDK-0235764</u> | 14. <u>CDK-1861079</u> |

**II. Other CDK Documents and Communications (87 Documents)**

The following documents are not entitled to Highly Confidential treatment for the reasons stated above and because they are not “Highly Confidential” under ¶ 8(a) of the Confidentiality Order or the relevant caselaw; they are all more than three years old; and a “Confidential” designation will fully protect CDK’s legitimate interests:

- |                                      |                        |
|--------------------------------------|------------------------|
| 15. <u>CDK-0066958</u>               | 30. <u>CDK-0019518</u> |
| 16. <u>CDK-0602338</u>               | 31. <u>CDK-0855506</u> |
| 17. <u>PI Hearing Ds’ Ex. 24</u>     | 32. <u>CDK-0230616</u> |
| 18. <u>PI Hearing Ds’ Ex. 31</u>     | 33. <u>CDK-0040165</u> |
| 19. <u>CDK-0189652</u>               | 34. <u>CDK-0223000</u> |
| 20. <u>CDK-2182930</u>               | 35. <u>CDK-0109347</u> |
| 21. <u>CDK-0061228</u>               | 36. <u>CDK-0035959</u> |
| 22. <u>CDK-0473275</u> (cover email) | 37. <u>CDK-0124034</u> |
| <u>CDK-0473277</u> (attachment)      | 38. <u>CDK-0105062</u> |
| 23. <u>CDK-0189798</u>               | 39. <u>CDK-0215041</u> |
| 24. <u>CDK-0022018</u>               | 40. <u>CDK-0325566</u> |
| 25. <u>CDK-0053346</u>               | 41. <u>CDK-0016195</u> |
| 26. <u>CDK-0863519</u>               | 42. <u>CDK-0049380</u> |
| 27. <u>CDK-0236597</u>               | 43. <u>CDK-0728579</u> |
| 28. <u>CDK-0021983</u>               | 44. <u>CDK-0053764</u> |
| 29. <u>CDK-0018738</u>               | 45. <u>CDK-0235305</u> |

46. <u>CDK-0177998</u>	61. <u>CDK-1138147</u>
47. <u>CDK-2397246</u>	62. <u>CDK-1203686</u>
48. <u>CDK-0049413</u>	63. <u>CDK-0688619</u>
49. <u>CDK-1421310</u>	64. <u>CDK-0039309</u>
50. <u>CDK-0061059</u>	65. <u>CDK-0061059</u>
51. <u>CDK-0458493</u>	66. <u>CDK-1221834</u>
52. <u>CDK-0473731</u>	67. <u>CDK-1393076</u>
53. <u>CDK-0039309</u>	68. <u>CDK-1421310</u>
54. <u>CDK-1221834</u>	69. <u>CDK-2182963</u>
55. <u>CDK-1802134 (cover email)</u>	70. <u>CDK-2219474</u>
<u>CDK-1802135 (attachment)</u>	71. <u>CDK-2239477</u>
56. <u>CDK-1802135</u>	72. <u>CDK-1714946</u>
57. <u>CDK-0802599</u>	73. <u>CDK-1716917</u>
58. <u>CDK-0817721</u>	74. <u>CDK-2426621</u>
59. <u>CDK-0977351</u>	
60. <u>CDK-0686257</u>	

The following documents are not entitled to Highly Confidential treatment for the reasons stated above and because they are not “Highly Confidential” under ¶ 8(a) of the Confidentiality Order or the relevant caselaw and a “Confidential” designation will fully protect CDK’s legitimate interests:

75. <u>CDK-0843493</u>	82. <u>CDK-1138147</u>
76. <u>CDK-0032559</u>	83. <u>CDK-1203686</u>
77. <u>CDK-0584712</u>	84. <u>CDK-0569059</u>
78. <u>CDK-0177588</u>	85. <u>CDK-0693118</u>
79. <u>CDK-0913658</u>	86. <u>CDK-0224081</u>
80. <u>CDK-0797233</u>	87. <u>CDK-0019201</u>
81. <u>CDK-0987733</u>	

\* \* \*

In accordance with ¶ 8(a) of the Confidentiality Order, please let us know within 10 days whether CDK will agree to de-designate the Subject Documents (or any subset of the Subject Documents) from “Highly Confidential” to “Confidential.”

If CDK refuses to de-designate any of the Subject Documents from “Highly Confidential” to “Confidential,” MDL Plaintiffs reserve all rights and plan to seek prompt relief from the Court pursuant to ¶ 8(b) of the Confidentiality Order.

Very truly yours,  
*s/ Joshua Hafenbrack*  
Joshua Hafenbrack

CC: MDL Service External Email List